The Approach to European Law in German Jurisprudence

*By Dieter H. Scheuing**

A. Introduction

To adequately assess the approach to European law in German jurisprudence is an impossible task to fulfill, yet one which is indispensable.

The impossibility of such an attempt becomes clear if one realizes the multitude and variety of courts and judicial procedures existing in the Federal Republic of Germany. Our present judicial system is composed of 1,162 national courts with a total of about 21,000 judges.[1] Eight of these courts are federal courts, the others are courts of the *Länder*, i.e. of the sixteen Member States of the Federation. Besides the Federal Constitutional Court (*Bundesverfassungsgericht)* and fifteen Constitutional Courts of the *Länder*, Germany has established five so-called "specialised judiciaries" (*Fachgerichtsbarkeiten)*, namely the Civil and Criminal Judiciary, the Labour Judiciary, the Administrative Judiciary, the Financial Judiciary and the Social Judiciary. Each of these five specialised judiciaries are organized hierarchically, which allows in almost every case the successive appeal to normally two and in many cases even three instances.[2] The result is that in the year 2000, for example, German courts delivered close to 3 million judgments and other final judicial decisions.[3] It is

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[1] Cf. the attached sketch of the German judicial system; the number of judges is based on the data in the official German Statistical Yearbook 2002 (Statistisches Bundesamt, ed., Statistisches Jahrbuch 2002 für die Bundesrepublik Deutschland und für das Ausland).

[2] Moreover, after all these remedies have been exhausted, and sometimes even before, the *Bundesverfassungsgericht* can be seized by the plaintiffs for a fundamental rights review over the court decisions via the constitutional complaint (*Verfassungsbeschwerde*).

[3] Estimation based on the data in the official German Statistical Yearbook 2002 (see above footnote 1).

https://doi.org/10.1017/S2071832200012803 Published online by Cambridge University Press

obvious that such an immense annual output does not allow for a truly comprehensive and detailed analysis of the acceptance of European law by German courts.

It is, however, indispensable to attempt such an evaluation. For from the beginning in 1949 onwards, the *Grundgesetz* as our Constitution has welcomed the European unification, and this constitutional pledge has been further strengthened in 1992 by an express constitutional assignment for all public authorities to promote the European Union.[4] Thus it has always been a constitutional obligation for German courts under the *Grundgesetz* to respect and promote in their activities the evolving law of European integration. Only if German courts comply with that obligation, can European law gain its due practical significance in Germany. Therefore, it is necessary to examine how German courts respond to that decisive challenge.

B. Issues

Under these circumstances a concentration on a few characteristic aspects is imperative. Thus I will carry out my impossible and yet indispensable task by highlighting how some German courts have to date dealt with three crucial issues concerning European Community law. These issues will be the supremacy of Community law, the direct effect of Community law and the cooperation between national courts and the European Court of Justice within the framework of the preliminary reference procedure.

I. Supremacy of Community Law

With regard to the Community law's claim for supremacy over national law, a significant ambiguity is to be noted in the German courts' response to this challenge. On the one hand, the supremacy of Community law over German *legislation* has soon been widely accepted. On the other hand, the Community law's claim for supremacy over German *constitutional law* has encountered long-lasting resistance.

1. Supremacy of Community Law over German Legislation

The supremacy of Community law over national legislation had its breakthrough in Germany already in the early 1970s. It was introduced into the German legal order with the aid of milk powder. In 1963, the German company Lütticke imported milk powder from Luxemburg to Germany and was charged, according to German tax law, with a turnover tax of 4 percent, whereas the turnover tax for milk powder

[4] Cf., in the German Basic Law, the Preamble and Article 24 of 1949 as well as Article 23 in its version of 1992.

https://doi.org/10.1017/S2071832200012803 Published online by Cambridge University Press

produced in Germany amounted to only 3 percent. The *Finanzgericht des Saarlandes*, seized by the company Lütticke, referred the case to the Court of Justice of the European Communities (ECJ). In its preliminary ruling of 1966, the European Court held that a higher tax on imported milk powder compared to domestic milk powder was in breach of the prohibition of discriminatory internal taxation contained in the EEC Treaty.[5] Subsequently, the *Bundesfinanzhof* reduced the tax to be paid by the company Lütticke from 4 to 3 percent, thus partly overruling the 4 percent expressly provided for in German tax law.[6] In deciding on a constitutional complaint filed against this judgment, the *Bundesverfassungsgericht* affirmed in 1971 the supremacy of Community law over German legislation. In the view of the Constitutional Court the *Bundesfinanzhof* had been entitled and even obliged to set aside national law, as it had done, in order to give full effect to the relevant provision of the EEC Treaty; for Community law would "overlay and override inconsistent national law".[7]

The supremacy of Community law over German legislation has been accepted by German courts not only in marginal issues such as the minor change of the taxation rate in the *Lütticke* case, but also in cases where fundamental legal guarantees were at stake. The German courts have respected the supremacy at last, once the ECJ had handed down a decision on the matter in question.

This can be illustrated by the famous *Alcan* case. In 1983, the *Land Rheinland-Pfalz* had paid the company Alcan an aid of 8 million DM. This aid being unlawful under the EEC Treaty, the Commission ordered its recovery in 1985. In 1989, the *Land Rheinland-Pfalz* finally revoked the granting of the aid and demanded repayment from Alcan. In opposing this recovery, Alcan relied on a provision of the German "Law on Administrative Procedure" (*Verwaltungsverfahrensgesetz)*, according to which revocation of an unlawful administrative act granting a benefit is only permissible within a period of one year. The *Bundesverwaltungsgericht*, as third instance in this case, showed a tendency to apply this provision in favour of Alcan, but made a reference to the ECJ. With a view to safeguard the effectiveness of Community law, the ECJ stated in its judgment of 1997 that "Community law requires the competent authority to revoke a decision granting unlawful aid, in accordance with a final decision of the Commission declaring the aid incompatible with the common market and ordering recovery, even if the authority has allowed the time limit laid down for that purpose under national law in the interest of legal

[5] Lütticke, 1966 ECR 257 (ECJ, 16 March 1966, Case 57/65).

[6] BFH, 15 January 1969, *Lütticke,* Entscheidungen des Bundesfinanzhofs 95, 67.

[7] BVerfGE 31, 145, 174 (translation: *D.H.S.*).

certainty to elapse."[8] In its final judgment of 1998, the *Bundesverwaltungsgericht* declared itself bound by the preliminary ruling; it therefore rejected Alcan's claim for annulment of the *Land*'s decision to revoke the granting of the aid.[9] Seized then by Alcan, the *Bundesverfassungsgericht* approved this judgment of the *Bundesverwaltungsgericht*.[10]

Moreover, it also happens that German courts set aside German law inconsistent with Community law even in cases where no relevant decisions of the ECJ yet exist.

One judge of the *Amtsgericht Miesbach* in Upper Bavaria would even merit the erection of a monument in the center of that town in his honour. This courageous judge wrote legal history when, in 1982, he first set aside German laws and regulations inconsistent with Community law without previously referring, as he could have done, the case to the ECJ for a preliminary ruling.[11] The facts of the case: The Italian wine merchant Karl Prantl had sold Italian wine in Germany in traditional Italian bottles quite similar to German *Bocksbeutel* bottles (i.e. bottles having a characteristic bulbous shape). However, according to German wine law, only certain German wines were allowed to be marketed in Germany in *Bocksbeutel* bottles. Therefore, Mr Prantl was charged to the *Amtsgericht Miesbach* for offense against this German legislation. Considering Community law, our judge at the *Amtsgericht Miesbach* reached the conclusion that, although the bottles used were *Bocksbeutel* bottles within the meaning of the German wine law, this law could not be applied to the selling of foreign wines in Germany traditionally bottled in such bottles in other Member States. Despite his slightly inaccurate legal reasoning, our judge thus grasped intuitively the scope of the free movement of goods as guaranteed in Community law. Moreover, he explained that the wine bottles imported by Mr Prantl could easily be identified as wine from Italy by their labels; any mixing-up with German wine bottled in *Bocksbeutel* bottles would therefore be impossible – at least, "as long as one does not buy one's wine with closed eyes, just making out the shape of the bottle by touching it".[12] Consequently, our judge acquitted Mr Prantl, thus explicitly paying full tribute to the supremacy of Community law over Ger-

[8] Alcan II, 1997 ECR I 1591, para. 38 (ECJ, 20 March 1997, Case C-24/95).

[9] BVerwGE 106 328.

[10] BVerfGE 2000, 175.

[11] AG Miesbach, 6 July 1982, Prantl (not published).

[12] Cf. the extract from the judgment in: Scheuing, *Rechtsprobleme bei der Durchsetzung des Gemeinschaftsrechts in der Bundesrepublik Deutschland*, 1985 EUROPARECHT 229, 259 (translation: *D.H.S.*).

https://doi.org/10.1017/S2071832200012803 Published online by Cambridge University Press

man legislation.[13]

Besides the non-application of national law, another method to ensure the supremacy of Community law is the interpretation of national law "in conformity with Community law".

That this special way of implementing the supremacy of Community law is practiced by German courts too, can be illustrated by the famous case of the plaintiffs *von Colson und Kamann*. These two women had applied for jobs as social workers at a prison for men in the *Land Nordrhein-Westfalen* and had been refused on grounds of gender. In German law, § 611a of our Civil Code prohibited any discrimination of applicants on grounds of gender. However, the provision allowed in case of violation only the claim for "reliance loss", i.e. just the loss incurred by victims of a discrimination as a result of their belief that there would be no discrimination in the establishment of the employment relationship. Both plaintiffs initiated proceedings before the *Arbeitsgericht Hamm*. This Court considered that under German law it could allow only the claim for Ms. Colson's travel expenses (i. e. about 7 DM), Ms. Kamann having had no specific outlay in connection with her application. But the *Arbeitsgericht* made a reference to the ECJ as to the sanctions required by the EEC Equal Treatment directive in cases of discrimination. During proceedings before the European Court, the somewhat embarassed German Federal Government declared that § 611a of the Civil Code would not exclude the application of the more generous general provisions of German civil law governing compensation – an interpretation obviously contradicting the intention of the legislator and the predominant legal doctrine of that time. The ECJ stated that if the German civil law *could* be interpreted in such a way, than it also *had to be* interpreted in this sense, in conformity with the Equal Treatment directive.[14] Following this judgment, the *Arbeitsgericht Hamm* then awarded a compensation of 21,000 DM to each plaintiff although the § 611a of the Civil Code had not yet been amended at that time.

All in all, the supremacy of Community law over German *legislation* has been established without major difficulties.

2. Supremacy of Community Law over German Constitutional Law

However, things progressed differently as far as the supremacy of Community law over German *constitutional law* is concerned. Here, the *Bundesverfassungsgericht*

[13] This judge's view was subsequently confirmed in: Prantl, 1984 ECR 1299 (ECJ, 13 March 1984, Case 16/83).

[14] *Von Colson und Kamann*, 1984 ECR 1891 (ECJ, 10 April 1984, Case 14/83).

responded to the Community law's claim for supremacy by reserving, for constitutional reasons, ultimate rights to review Community law regarding its compatibility with fundamental rights and the distribution of powers between the European and the national level.

The fundamental rights issue led the *Bundesverfassungsgericht* from early on, to reserve for itself a complementary scrutiny of Community acts under the fundamental rights of the *Grundgesetz*. However, up to now, not a single Community act has failed the test of this German constitutional review. More recently, it even seemed as if the *Bundesverfassungsgericht* would practically have abandoned its reservation.

First of all, the *Bundesverfassungsgericht* took an extreme position. In its *Solange I* decision of 1974, following the ECJ-judgment of 1970 in the case *Internationale Handelsgesellschaft*,[15] the Court held that the applicability of secondary Community law in the Federal Republic was subject to an unrestricted fundamental rights review by the *Bundesverfassungsgericht*, subsequent and complementary to any fundamental rights review exercised by the ECJ. This would apply "as long as the integration process has not progressed so far that the Community law also receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the *Grundgesetz*."[16] This approach was obviously inconsistent with the necessary supremacy of Community law.

In 1986, the *Bundesverfassungsgericht* took a turn and declared in its *Solange II* decision, that it would no longer control the compatibility of Community law with German fundamental rights, "as long as the European Communities, and in particular the case law of the Court of Justice of the European Communities, generally ensure an effective protection of fundamental rights against the sovereign powers of the Communities".[17] It therefore seemed as if the *Bundesverfassungsgericht* finally had accepted the protection of fundamental rights on the Community level as sufficient and as if the Court would only theoretically still be interested to uphold its claim to respective judicial review.

Subsequent decisions, however, gave the impression that the *Bundesverfassungsgericht* intended to re-activate its claim to judicial control. This is particularly true for the Court's famous *Maastricht* judgment of 1993 concerning the German law

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[15] *Internationale Handelsgesellschaft*, 1970 ECR 1125 (ECJ, 17 December 1970, Case 11/70).

[16] BVerfGE 37, 271; 2 CMLR 540 (1974) – „*Solange I*".

[17] BVerfGE 73, 339; 3 CMLR 225 (1987) - „*Solange II*".

approving the Maastricht Treaty.[18] Some wordings in that judgment could imply that the *Bundesverfassungsgericht* would now claim a permanent, although substantially reduced supervision over the ECJ concerning the respect for fundamental rights.

However, in its judgment of 2000 on the market organization for bananas, the *Bundesverfassungsgericht* rejected such interpretations of its jurisprudence with most welcome clarity as "misunderstandings".[19] In a judgment of 1994, the ECJ had confirmed the compatibility of the banana regulation with the fundamental rights contained in EC law.[20] The *Verwaltungsgericht Frankfurt am Main* had then referred to the *Bundesverfassungsgericht.* Now the Constitutional Court did not embark on a discussion about the conformity of the banana regulation with German fundamental rights, but declared the reference made by the *Verwaltungsgericht Frankfurt am Main* to be inadmissible. In its reasoning, the *Bundesverfassungsgericht* only upheld its claim to review EC law under extremely strict conditions, procedurally as well as with regard to substance. The Court's control will only apply if the EC protection of fundamental rights no longer functions, a hypothesis that must be evaluated not in light of a single case, but in light of a longer development revealing general structural deficits on the European level. Furthermore, the applicant who appeals, or the German court which refers to the *Bundesverfassungsgericht*, has to give detailed proof of such structural deficits in the EC system.

Since such a general falling back on the European level is practically excluded, the reasoning of the *Bundesverfassungsgericht* in its banana-decision of 2000 may be read as the long-awaited farewell to its inappropriate claim for a German fundamental rights control over Community law.

A rather different set of fundamental rights problems has been raised in the case *Tanja Kreil*. Ms. Kreil had applied for voluntary professional service in the *Bundeswehr*, requesting to be assigned to duties in electronic weapons maintenance. Her application was rejected on the grounds that under German law women were barred from all military duties involving the use of arms In its preliminary ruling of January 2000 the ECJ held that the EEC Equal Treatment directive prohibited such national provisions excluding women from all professional service with arms in military forces.[21] Surprisingly enough, this decision has been widely welcomed in

[18] BVerfGE 89, 155; 1 CMLR 57 (1994) – „*Maastricht*".

[19] BVerfGE 102, 147 – „Bananenmarktordnung".

[20] Banana Market Regulation, 1994 ECR I-4973 (ECJ, 5 October 1994, Case C-280/93).

[21] Kreil, 2000 ECR I-69 (ECJ, 11 January 2000, Case C-285/98).

Germany – despite the fact that the *Grundgesetz* still contained at that time in its section on fundamental rights a provision that women "may on no account render service involving the use of arms".[22] The conflict was quite different from that raised in the *Solange* cases, for in *Kreil* there was not a possible undermining of higher German constitutional standards at stake, but the inconsistence of a limitation of German fundamental rights with a Community directive. In this context, the ECJ-ruling from January 2000 was obviously appreciated by the German side as an aid to getting rid of an outdated constitutional provision restricting fundamental rights. In any case, the *Grundgesetz* has been amended as recently as December 2000, although such amendments need two-third-majorities in both federal chambers. Now the Constitution simply states that women must not be *required* to render service involving the use of arms[23] As a consequence of this strengthened constitutional protection of women brought about by Community law, in January 2001 more than 200 female professional soldiers could enter the *Bundeswehr.* Ms. Kreil, however, was not among them – she had in the meantime opted for a different career.

Regarding the *Bundesverfassungsgericht*'s claim to control the exercise of Community competences by the Community institutions, (a claim vehemently registered in its *Maastricht* judgment of 1993[24]), fortunately no legal act of the Community has to date been treated as non-binding and therefore non-applicable in Germany on *ultra vires* grounds.

In summary, as far as the supremacy of Community law over national law is concerned, it can be underlined that the German courts accept this supremacy as a necessary consequence of Germany's participation in the project of European integration. Certain reservations and restrictions which the *Bundesverfassungsgericht* had felt inclined to introduce in order to protect German constitutional law have remained without practical significance.

II. Direct Effect of Community Law

My second cluster of questions will now deal with the direct effect of Community law in the context of the Member States' legal orders. Which position have German courts taken in that respect? Here, one can find in general, a widespread affirma-

[22] Article 12a paragraph 4 phrase 2 of the German Basic Law as amended in 1956 and 1968 (translation: *D.H.S.*).

[23] Article 12a paragraph 4 phrase 2 of the German Basic Law as amended in 2000.

[24] *Supra* note 18.

https://doi.org/10.1017/S2071832200012803 Published online by Cambridge University Press

tive attitude, but also cases of rejection.

1. Affirmation

Regarding the affirmative attitude of the German courts, I can largely refer to my explanations on the supremacy of Community law; for the supremacy and the direct effect of Community law are closely linked. Therefore, whenever German courts enforce the supremacy of Community law by setting aside inconsistent domestic law, they acknowledge at the same time the direct effect of the Community provision in question within the German legal order.

For German courts, it even caused no major problems when the ECJ, in the case *Grad v. Finanzamt Traunstein*, started to give some direct effect even to directives in order to compensate shortcomings in domestic transposition.[25] For example, according to a judgement of the *Bundesverwaltungsgericht* of 1986, the *Land Nordrhein-Westfalen* was not allowed to prevent the company Denkavit from importing food for animals that complied with the requirements of several EEC directives, but not with requirements contained in German laws and regulations which had not yet been adjusted to the EEC directives.[26]

2. Rejection

An exception, however, was the jurisprudence of the Fifth Senate of the *Bundesfinanzhof* who in the 1980s flexed its muscles in the *Kloppenburg* case.[27] The case dealt with a Community directive of 1977, which obliged the Member States to introduce the system of value added tax and to exempt at the same time, among others, loan agents from that tax; this directive was to be transposed into domestic law by the end of 1977 at the latest. Nevertheless, the Federal Republic enacted the transposition law only with effect from January 1980 onwards.

Ms. Kloppenburg had negotiated loans in the first half of 1978. Thus, she had become liable to pay taxes according to the German law being in force at that time. But according to the ECJ's jurisprudence since *Grad v. Finanzamt Traunstein*, the tax exemption had to be applied to Ms. Kloppenburg. This had even been affirmed in the *Kloppenburg* case by the ECJ itself in a preliminary reference procedure initiated

[25] Grad v. Finanzamt Traunstein, 1970 ECR 825 (ECJ, 6 October 1970, Case 9/70).

[26] BVerwGE 74, 241 – "*Denkawit*".

[27] BFH, 16 July 1981, Kloppenburg, Entscheidungen des Bundesfinanzhofs 133, 470 (provisional ruling); BFH, 25 April 1985, Kloppenburg, Entscheidungen des Bundesfinanzhofs 143, 383 (main judgment).

by the *Finanzgericht Niedersachsen* dealing with Ms. Kloppenburg's case in first instance.[28] Nevertheless, the Fifth Senate of the *Bundesfinanzhof* refused to grant Ms. Kloppenburg a tax exemption. This Senate stated, differing from other Senates of the *Bundesfinanzhof*, that it would be obvious for any reasonable person that Community directives could never have any direct effect as long as not properly transposed into domestic law. Therefore, Ms. Kloppenburg was declared liable to pay taxes for 1978.

This judgment was a true declaration of war addressed by these German judges to the European judges. Yet, as regrettable as it may have been, the judgment caused a fortunate result: In considering the constitutional complaint filed by Ms. Kloppenburg in this case, the *Bundesverfassungsgericht* stated in 1987 that German courts are obliged to respect the case law of the ECJ concerning the limited direct effect of Community directive provisions. Therefore, the *Bundesverfassungsgericht* reversed the judgment of the *Bundesfinanzhof* and referred the case back to the *Bundesfinanzhof* for new consideration.[29]

As a consequence, the Community law emerged strengthened from this controversy: The limited direct effect of directives has not been disputed by German courts since.

Nevertheless, the ECJ itself has basically excluded the possibility to directly invoke directive provisions in conflicts between private parties.[30] From this limitation, the *Bundesarbeitsgericht* drew quite spectacular conclusions in a decision handed down in February 2003. In this case an agreement on working time had been made between the *Red Cross* (as a private employer) and its workers council (as a representative of the private employees). Later on, the workers council sought a judgment stating the invalidity of the agreement on the grounds that the agreement allowed for a weekly working time of more than 48 hours, including hours of duty on call. The problem now was that the agreement in question was inconsistent with an EC directive, but at the same time consistent with contradicting German law. Indeed, according to the EC Working Time directive of 1993, the average weekly working time of employees must not exceed 48 hours. Considered as working time in the sense of this directive are, according to the ECJ judgment of 2000 in the Spanish SIMAP case, also the hours of duty on call during which the employees are re-

[28] Kloppenburg, 1984 ECR 1075 (ECJ, 22 February 1984, Case 70/83).

[29] BVerfGE 75, 223.

[30] Marshall, 1986 ECR 723 (ECJ, 26 February 1986, Case 152/84); Faccini Dori, 1994 ECR I-3325 (ECJ, 14 July 1994, Case C-91/92).

quired to be present in the employer's premises.[31] The German law on working time, however, considers all hours of duty on call, during which the employees are not actually working, as periods of rest. The *Bundesarbeitsgericht*, arguing that this law leaves no room for an interpretation in conformity with the EC directive, declared the German law, though inconsistent with Community law, still applicable to legal relations between private parties until the German legislator amends the legal provisions conflicting with Community law. Consequently, the *Bundesarbeitsgericht* rejected the workers council's request for a statement on the invalidity of the working time agreement.[32]

This decision of the *Bundesarbeitsgericht* raises a number of remarks.

The first question is, whether the *Bundesarbeitsgericht* should not have referred the case to the ECJ for a preliminary ruling. Indeed, it was not absolutely clear whether the jurisprudence *Faccini Dori*[33] really applied to the case. Moreover, it is possible that, if this was the situation, the ECJ may have chosen to modify its jurisprudence in light of this new case.

Anyway, the conclusions drawn by the *Bundesarbeitsgericht* are highly unsatisfactory. This is not only true because of the continuing application of domestic law inconsistent with a Community directive. It should also be taken into account that at present out of the approximately 2,200 hospitals existing in Germany, about 60 percent are run by private corporations,[34] whilst the other 40 percent of German hospitals are run by public authorities, and their employees can already invoke the EC Working Time directive against their public employers.[35]

Looking at the financial aspects of the case, the German Hospital Society had estimated, that in case of success of the workers council - because of the then necessary employment of new doctors in many other cases - additional annual costs amounting to 1,750 million Euros would be incurred by the German hospitals.[36] Now, ac-

[31] SIMAP, 2000 ECR I-7963 (ECJ, 3 October 2000, Case C-303/98); Confirmed in the meantime in: ECJ, 9 September 2003, Case C-151/02 Jaeger (not yet published).

[32] BAG, 18 February 2003, Case 1 ABR 2/02, NEUE ZEITSCHRIFT FÜR ARBEITS- UND SOZIALRECHT 2003, 742.

[33] *Faccini Dori*, 1994 ECR I-3325 (ECJ, 14 July 1994, Case C-91/92).

[34] Estimations based on the data in the official German Statistical Yearbook 2002 (see above footnote 1) and the statistics of the German Hospital Society, *Krankenhausstatistik: Grunddaten der Krankenhäuser 2001*, www.dkgev.de/1_pub.htm, 18 October 2003.

[35] Sic in the meantime BAG, 5 June 2003, Case 6 AZR 114/02, not yet published.

[36] Reported in: Frankfurter Allgemeine Zeitung 19 February 2003, 13.

cording to the decision of the *Bundesarbeitsgericht* from February 2003, the 60 percent of private hospitals are still exempt from these additional costs, whereas the 40 percent of public hospitals are faced with their share of the burden immediately. The absurdity of this "solution" is even intensified by the fact that doctors employed in private hospitals might be entitled, on grounds of the non-enforceability of their rights guaranteed by the directive, to claim State damages according to the principle of State liability elaborated in the ECJ's *Francovich* jurisprudence.[37]

III. Cooperation of Courts in the Preliminary Reference Procedure

A third issue remains to be discussed. What about the cooperation between the German courts and the ECJ within the framework of the preliminary reference procedure?

It should be mentioned first that German courts in general are very willing to refer cases to the ECJ. From 1953 to 2001, a total of 4,618 requests for preliminary rulings have been addressed to the ECJ; about one quarter of these came from German courts.[38] This number demonstrates that for German courts the preliminary reference procedure has become a widely accepted integral part of the German legal protection system.

Taking a closer look, one should distinguish between optional and mandatory cooperation.

1. Optional Cooperation

Regarding optional cooperation, it should be stressed that about 70 percent of the German preliminary references are not made by federal courts, but by the courts of the *Länder*. In a majority of cases, they will not decide as courts of last instance; they are then free either to refer questions concerning the interpretation of Community law to the ECJ or to answer these questions by themselves without prior reference. The fact that these German courts of lower instance refer so often voluntarily to the ECJ indicates clearly that they consider the jurisprudence of the Court of Justice within the framework of the preliminary reference procedure as valuable and helpful for them.

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[37] *Francovich*, 1991 ECR I-5357 (ECJ, 19 November 1991, Cases C-6/90 and C-9/90); *Dillenkofer*, 1996 ECR I-4845 (ECJ, 8 October 1996, Cases C-178/94 et al.).

[38] These figures are based on the ECJ-statistics in: http://curia.eu.int/de/instit/presentationfr/rapport/stat/st01cr.pdf, 18 October 2003.

Some preliminary rulings of the ECJ requested by German courts of lower instance, however, have not been welcomed by the federal High Courts. Sometimes, these federal courts even prompted the ECJ to change its legal opinion by making a reference themselves on the next occasion. Yet, these initiatives were rarely successful as could be shown in the cases *Molkereizentrale* of 1968[39] and *Paletta II* of 1996.[40]

It happens that the ECJ even feels disturbed by the lower German courts' willingness to ask the Court of Justice for preliminary rulings. A striking example is the *Grado* case: Because of a traffic accident involving an Italian citizen, the Public Prosecutor had applied to the *Amtsgericht Reutlingen* for a summary punishment order to be issued against "Martino Grado" – and not against "*Herrn* Martino Grado". The competent magistrate of the *Amtsgericht Reutlingen* regarded the omission of the courtesy expression "*Herr*" from the name of the accused person as unacceptable. He made reference to the ECJ, asking the Court whether such a way of dealing with foreign citizens of the Union did not violate the Community law provisions prohibiting discrimination on grounds of nationality. In its decision of 1997, the ECJ abstained from a preliminary ruling, stating that "the court has no jurisdiction to give a preliminary ruling on a question submitted by a national court where it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual facts of the main action or its purpose."[41]

2. Mandatory Cooperation

Regarding now mandatory cooperation, i.e. constellations where German courts are not only entitled, but obliged under Community law to ask the ECJ for preliminary rulings, such an obligation exists to a limited extent also for courts of lower instance. Indeed, in the *Foto-Frost* case the ECJ confirmed the opinion expressed by the referring *Finanzgericht Hamburg* that (exceeding the wording of the Treaty) national courts other than those of last instance are nevertheless obliged to refer to the ECJ if they question the validity of the applicable secondary Community law.[42] This monopoly of the ECJ for judicial review has been reaffirmed and at the same time modified by the ECJ itself in its decisions *Zuckerfabrik Süderdithmarschen* of 1991[43] and *Atlanta* of 1995[44], both preliminary rulings also due to references made

[39] *Molkereizentrale*, 1968 ECR 215 (ECJ, 3 April 1968, Case 28/67).

[40] *Paletta II*, 1996 ECR I-2357 (ECJ, 2 May 1996, Case C-206/94).

[41] *Grado*, 1997 ECR I-5531, para. 12 (ECJ, 9 October 1997, Case C-249/96).

[42] *Foto-Frost*, 1987 ECR 4199 (ECJ, 22 October 1987, Case 314/85).

[43] *Zuckerfabrik Süderdithmarschen*, 1991 ECR I-415 (ECJ, 21 February 1991, Cases C-143/88 and C-92/82).

[44] *Atlanta*, 1995 ECR I-3799 (ECJ, 9 November 1995, Case C-465/93).

by German courts.

Nevertheless, in Germany the obligation to make reference to the ECJ rests above all with the five federal High Courts and with the *Bundesverfassungsgericht*. The fulfillment of their obligation shows significant differences.[45] Out of a total of 387 requests for preliminary rulings initiated by German federal courts between 1953 and 2001, the *Bundesfinanzhof* holds the record of 185 references, i.e. almost the half of the total of these references. In the middle, we find the *Bundesverwaltungsgericht*, the *Bundessozialgericht* and the *Bundesgerichtshof* with between 51 and 82 references. Definite reluctance becomes obvious if one looks at the *Bundesarbeitsgericht*, which in these 48 years has only made 4 references to the ECJ.

But the situation is even more extreme in the case of the *Bundesverfassungsgericht*. Up to now, not a single reference has been made by the *Bundesverfassungsgericht* to the ECJ, although this German Court had already confirmed in its *Solange I* decision of 1974 that it could itself be obliged to do so.[46] For example, during recent proceedings aiming at a party ban on the extreme right-wing National Democratic Party (NPD), this political party suggested explicitly a reference to the ECJ. Their representatives argued that a ban would also impede their party to participate in future elections to the European Parliament; therefore, the possible impact of EC law on the domestic law concerning political parties should be clarified. The *Bundesverfassungsgericht* as the first and last judicial instance in party ban proceedings refused the proposed reference on the grounds that there were no questions whatsoever requiring any clarification as to the interpretation of EC law.[47]

A similar reasoning can be found in a decision on the motorway ring around Munich handed down in 1996 by the the *Bundesverwaltungsgericht*. This court stated that a reference to the ECJ for interpretation of the EEC directive on the assessment of environmental effects would not be necessary, since the administrative consent procedure for the motorway ring had already been initiated in 1983.[48] According to the *Bundesverwaltungsgericht* the ECJ had sufficiently clarified in its preliminary ruling in the *Großkrotzenburg* case that a direct effect of the directive could only be considered for projects whose administrative consent procedures had been initiated after the time limit for the transposition of the directive, i.e. after 3 July 1988. This was not true, because in that preliminary ruling, the ECJ had stated "regardless

[45] These figures are also based on the ECJ-statistics (see above footnote 38).

[46] BVerfGE 37, 271, 282; 2 CMLR 540 (1974) - „*Solange I*".

[47] BVerfGE 104, 214 – "NPD-Verbot".

[48] BVerwGE 100, 370 – „*Autobahnring München*".

https://doi.org/10.1017/S2071832200012803 Published online by Cambridge University Press

whether the directive permits a Member State to introduce transitional rules for consent procedures already initiated and in progress before the deadline of 3 July 1988, the directive in any case precludes the introduction in respect of procedures initiated after that date ...."[49] The *Bundesverwaltungsgericht* here falsely passed on a question explicitly left open by the ECJ as already negatively answered by the European Court. In setting up this manoeuvre, the *Bundesverwaltungsgericht* only insufficiently covered up the violation of its obligation to a preliminary reference. Even more regrettable is that the *Bundesverfassungsgericht* in a decision of 1996 in this case did not complain about the attitude taken by the *Bundesverwaltungsgericht*.[50]

Unfortunately, such violations of the obligation of German courts to refer questions to the European Court of Justice have occurred and are still occurring occasionally. A particularly striking example was the aforementioned *Kloppenburg* case. In Community law itself, there is no remedy for individuals against a national court's decision to abstain from referring to the ECJ. However, in German law the *Bundesverfassungsgericht* has created such a remedy (applicable as long as no violation of the reference obligation by the *Bundesverfassungsgericht* itself is at stake).

A recent example is the case of Ms. Rinke, a female physician from Hamburg who sought unsuccessfully recognition as a general medical practitioner. The *Bundesverwaltungsgericht*, as court of last instance in this case, denied her claim.[51] During court proceedings questions on Community law had played a crucial role, especially the question of how certain conflicting EEC directives related to one another and to the fundamental Community right of equal treatment for men and women. The *Bundesverwaltungsgericht* did not, nevertheless, refer these questions to the ECJ, thus violating its obligation under Community law. The *Bundesverfassungsgericht*, seized by Ms. Rinke, qualified in its decision of 2001 – in continuation of previous decisions – the ECJ in cases of mandatory cooperation as the "lawful judge" in the sense of the respective fundamental right enshrined in the Grundgesetz. The Constitutional Court now considers this fundamental right already as violated if a German court does not try sufficiently to be informed of the relevant Community law and misjudges therefore its obligation to introduce a preliminary reference. Accordingly, the *Bundesverfassungsgericht* reversed the judgment of the *Bundesverwaltungsgericht* in the *Rinke* case on grounds of violation of the German fundamen-

[49] *Großkrotzenburg*, 1995 ECR I-2189, para. 28 (ECJ, 11 August 1995, Case C-431/92).

[50] BVerfGE, 21 August 1996, *Autobahnring München*, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 1997, 481.

[51] BVerwGE 108, 289.

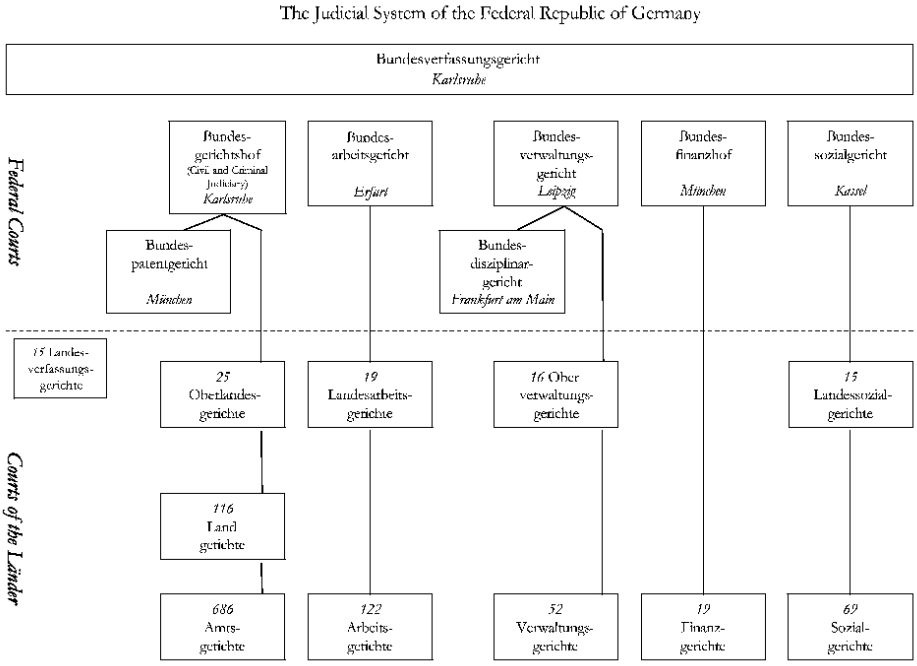
tal right to the lawful judge and referred the case back to the *Bundesverwaltungsgericht* for new consideration.[52] Thus, the *Bundesverfassungsgericht* activated German fundamental rights protection not *against*, but *in favour* of Community law. Such an approach, which had already allowed the rebellious attitude shown by the Fifth Senate of the *Bundesfinanzhof* in the *Kloppenburg* case to be overcome, merits to be qualified as a true strategy of cooperation in the field of fundamental rights.

C. Final Remarks

In concluding, I would like to stress again that I could do no more than to shed some light on the approach of a few German courts to selected aspects of European law. Facing an annual output of nearly 3 million judgments and other final judicial decisions, there inevitably remains much in the shadows. Moreover, the German jurisprudence does not illustrate a thoroughly positive picture. Some of the approximately 21,000 German judges at the 1,162 German courts, notably judges at federal courts and judges of the elder generation, still seem to have a humorous, if not to say distant or even defensive attitude, towards the supranational European law and the ECJ as its supreme guardian. However, the *Bundesverfassungsgericht* has apparently made peace with the ECJ. Other German courts do no more tend to put up fundamental resistance, but rather to occasionally adopt a strategy of avoidance or circumvention. Moreover, in the same way as German courts are at present in their overwhelming majority courts of the *Länder* and yet predominantly apply federal law, a further change in this regard may not be impossible in a long-term perspective. Such a change could and should consist in a new self-perception of the German courts. They should recognize more and more that they are also – even in the first place – European courts or European law courts. In the context of such an Europeanized attitude towards their assignment to effective legal protection, the European law, in former years sometimes a source of friction for German judges, will become a pre-eminent point of reference for them and an instrument helping them to contribute to the progressive realization of a living supranational legal order in Europe.

[52] BVerfGE, 9 January 2001, *Rinke,* NEUE JURISTISCHE WOCHENSCHRIFT 2001, 1267. The *Bundesverwaltungsgericht* then referred to the ECJ, who stated that the directive provisions on full time work were consistent with the equal treatment of men and women: ECJ, 9 September 2003, Case C-25/02 Rinke (not yet published).

Annex: The Judicial System in The Federal Republic of Germany



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